

Labor and Industry File Nos.  
(formerly Commerce)  
BC2203442/HRH and  
BC2403572/HRH

15-1902-16506-2

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of the Certificate of  
Exemption of Tom Kissell, Certificate No.  
20059383

FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATION

The above-matter came on for a hearing before Administrative Law Judge Beverly Jones Heydinger on July 12, 2005 at 9:30 a.m. at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, Minneapolis, Minnesota. The hearing record closed on July 12, 2005.

Michael J. Tostengard, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared representing the Department of Labor and Industry ("the Department").<sup>[1]</sup> Tom Kissell ("Respondent"), 16177 Excelsior Drive, Rosemount, MN 55068, appeared on his own behalf.

**NOTICE**

This report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommended Decision. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Nancy Leppink, Deputy Commissioner, Minnesota Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the

expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

### **STATEMENT OF ISSUE**

Did Respondent violate Minn. Stat. § 326.84, subd. 1 and 1b, by engaging in unlicensed residential building contractor activity?

Did Respondent violate Minn. Stat. § 326.91, subd. 1(2), and Minn. R. 2891.0040, subp. 1.H., by failing to obtain the required building permits?

Did Respondent demonstrate financial irresponsibility in violation of Minn. Stat. § 326.91, subd. 1(12), by failing to satisfy the Krussow judgment?

Did Respondent violate Minn. Stat. § 45.027, subd. 1 and 1a, by failing to comply with the Department's Order to Appear?

Is discipline of Respondent in the public interest?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

1. Respondent Tom Kissell is a building contractor who works primarily on commercial projects and new construction as a sub-contractor.

2. Respondent was originally issued a Certificate of Exemption<sup>[2]</sup> by the Department on March 21, 1996. When the Certificate expired on March 31, 2001, he renewed it on May 7, 2001. Respondent's Certificate again expired on March 31, 2002, and he did not renew it at that time.

3. In May 1999, Kermit Krussow of Minneapolis hired Respondent to re-roof his home. Respondent did not properly install the roof and water leaked through the roof into the attic. Respondent's attempt to repair the leak failed.

4. In April 2002, the Department received a complaint from Mr. Krussow about Respondent's 1999 roofing job. The Department confirmed the complaint through an investigation. Mr. Krussow filed a lawsuit against Respondent and obtained a judgment from Dakota County Conciliation Court in June 2002 in the amount of \$4,565.86.<sup>[3]</sup> The judgment has not been satisfied. The Respondent does not intend to pay it.<sup>[4]</sup>

5. In early April 2004, Respondent started a re-roofing job on a house in St. Louis Park. Because the house was rental property, Respondent assumed that the property was classified as commercial, and he did not renew his Certificate of Exemption.<sup>[5]</sup>

6. Later in April 2004, the City of St. Louis Park Inspections Department received a complaint that Respondent re-roofed a house without a building permit or a license. The City's investigation confirmed the complaint, and by letter dated April 30, 2004, the City of St. Louis Park ordered Respondent to cease any and all residential work within the City that required a license from the Department until such time as he could show that he had obtained the appropriate permit.<sup>[6]</sup> The Department received a copy of the April 30, 2004 letter on May 3, 2004.<sup>[7]</sup> When Respondent learned that the property was residential, he applied for a Certificate of Exemption by mail prior to the completion of the project.<sup>[8]</sup>

7. The Department issued Respondent a renewed Certificate of Exemption on May 3, 2004.

8. In a letter dated June 25, 2004, the Department informed Respondent that it had opened an investigation into his roofing work and requested that Respondent provide to the Department a complete list of the names, addresses, and phone numbers of all the homeowners with whom he had contracted to perform remodeling or construction work since January 1, 2003.<sup>[9]</sup> In addition, the Department asked Respondent to provide an explanation of his failure to obtain the appropriate permit. Respondent had until July 14, 2004, to respond to these requests.<sup>[10]</sup> The Department sent the letter via certified mail, but could not produce a signed receipt to show that Respondent received the letter; but neither did the Department receive the letter back.

9. In early July, Respondent moved to Florida to do construction work.<sup>[11]</sup>

10. Respondent did not respond to the Department's letter.<sup>[12]</sup>

11. On August 25, 2004, the Department issued an Order to Appear to Respondent; he did not appear as ordered. The Respondent called the Department's investigator, Herman Hauglid, and told Mr. Hauglid that he was in Florida and could not appear.

12. The Department issued a Notice of and Order for Hearing, Order for Prehearing Conference, and Statement of Charges to Respondent on April 12, 2005. The Prehearing Conference occurred on May 26, 2005, at which time the Administrative Law Judge set the hearing for July 12, 2005.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

## **CONCLUSIONS**

1. The Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter under Minn. Stat. §§ 45.027, 326.91, and 14.50.

2. The Respondent was given timely and proper notice of the hearing in this matter.

3. The Department has complied with all procedural requirements of law.

4. The Department must prove by a preponderance of the evidence that the alleged violations occurred.<sup>[13]</sup>

5. Minn. Stat. § 326.84, subd. 1 and 1b require a residential building contractor to be licensed.

6. A licensed residential contractor is prohibited from engaging in fraudulent, dishonest, or deceptive practices, such as performing any construction without obtaining applicable local building permits and inspections.<sup>[14]</sup> The Department has proved by a preponderance of the evidence that Respondent engaged in fraudulent, dishonest, or deceptive practices by performing construction without a license and without obtaining the applicable local building permits and inspections.

7. The Commissioner of Labor and Industry has authority to revoke a license and impose civil penalties against a licensee who has demonstrated financial irresponsibility by failing to satisfy a judgment entered against him.<sup>[15]</sup> The Department has proved by a preponderance of the evidence that Respondent is financially irresponsible due to his failure to pay a judgment against him for his work on the Krussow project.

8. Minn. Stat. § 45.027, subd. 1 and 1a allow the Commissioner to conduct investigations into matters related to the duties and responsibilities of the Commissioner. A licensee must respond to the Commissioner's requests under the investigation within the time specified by the Commissioner. The Department has proved by a preponderance of the evidence that Respondent did not appear as ordered.

9. Discipline of Respondent is in the public interest.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED: That disciplinary action be taken against the residential contractor's license of Tom Kissell.

Dated this 28th day of July 2005.

S/ Beverly Jones Heydinger

BEVERLY JONES HEYDINGER  
Administrative Law Judge

Reported: Tape-Recorded  
One Tape, No Transcript Prepared.

**MEMORANDUM**

Respondent acknowledges that he has failed to pay the judgment entered against him by Kermit Krussow. He also testified that he does not intend to pay the judgment in the future. Accordingly, the Department has established a violation under Minn. Stat. § 326.91, subd. 1(12).

The alleged violations under Minn. Stat. §§ 326.84, subd. 1 and 1b; 326.91, subd. 1(2); and Minn. R. 2891.0040, subp. 1.H., all relate to the circumstances of the St. Louis Park job in April 2004. Respondent testified credibly that he was mistaken about the status of the property as residential, and he stated that he applied for the Certificate of Exemption as soon as he discovered his mistake. Furthermore, Respondent testified that the only reason he did not renew his Certificate in 2002 was because he was not performing residential work at that time.

Minn. R. 2891.0040, subp. 1.H. defines the failure to obtain the applicable local building permits or inspections as a fraudulent, deceptive or dishonest practice. So even though Respondent did not act intentionally to deceive or defraud, the Department has shown that he did, nevertheless, violate Minn. R. 2891.0040, subp. 1.H. Respondent's behavior comes within the prohibition in the statute and rule and is subject to discipline. The Commissioner may consider the circumstances in this dispute in considering whether or not to impose civil penalties.

Finally, as to Respondent's failure to appear as ordered by the Department, Respondent testified that he did not receive the Department's letter dated June 25, 2004, likely because he left the state to do construction work in Florida earlier that month. Respondent testified that he received word from his mother in Minnesota of another letter sent to him by the Department. This letter, though not produced at the hearing, was likely the Order to Appear. Based upon that second letter, Respondent stated that he called Herman Hauglid at the Department and informed him that he was out of the state for some period of time and would not be able to appear as ordered.<sup>[16]</sup> It was Respondent's understanding that because he could not appear as ordered by the Department that he had "forfeited" the matter. As a result, Respondent did not appear in Minnesota and did not attempt to agree with the Department on another date at which he might appear. Based upon these facts, the Department has shown a violation of Minn. Stat. § 45.027. As above, the Commissioner may consider the circumstances in this dispute in considering whether or not to impose civil penalties.

**B.J.H.**

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<sup>[1]</sup> This action was commenced by the Department of Commerce. On May 16, 2005, the Governor signed Executive Order 193, transferring the responsibility for regulation of residential building contractors to the Department of Labor and Industry.

<sup>[2]</sup> A Certificate of Exemption is not a license, but any person performing residential building work that does not exceed \$15,000 in gross annual receipts must obtain a Certificate of Exemption for residential building projects. The Certificate is obtained by application, is free of charge, and requires no testing. Under Minn. Stat. § 326.91, subd. 3, failure to obtain a Certificate of Exemption when one is required constitutes failure to obtain a license.

<sup>[3]</sup> Ex. 1.

<sup>[4]</sup> Testimony of Respondent.

<sup>[5]</sup> Testimony of Respondent.

<sup>[6]</sup> Ex. 2.

<sup>[7]</sup> Ex. 2.

<sup>[8]</sup> Testimony of Respondent.

<sup>[9]</sup> Ex. 3.

<sup>[10]</sup> The letter advised Respondent that his failure to respond could result in a formal administrative action against him, including a fine up to \$10,000.

<sup>[11]</sup> Testimony of Respondent.

<sup>[12]</sup> Respondent testified that he never received the letter dated June 25, 2004.

<sup>[13]</sup> Minn. R. pt. 1400.7300, subp. 5.

<sup>[14]</sup> Minn. Stat. § 326.91, subd. 1(2); Minn. R. 2891.0040, subp. 1.H.

<sup>[15]</sup> Minn. Stat. § 326.91, subd. 1(12).

<sup>[16]</sup> Mr. Hauglid has no recollection of this conversation, possible due to the fact that his caseload is extremely large and he takes these types of phone calls many times per day.